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Community Obligations

IF PROPRIETARY equality is to be worked out between the spouses, it is quite as necessary to distinguish between separate and community obligations as between separate and community property. The following classification of obligations is suggested:¹

1. Contracts entered into and torts committed by the husband while employed in the interest of the community.²

2. Contracts entered into and torts committed by the husband (a) having no connection with community property; (b) connected with his separate property.³

3. Contracts entered into and torts committed by the wife in the interest of the community, whether or not a profit accrues to the community.⁴

4. Contracts entered into and torts committed by the wife either (a) in connection with her separate estate or interest or (b) having no connection with the community estate.⁵

I. CONTRACTS ENTERED INTO AND TORTS COMMITTED BY THE HUSBAND FOR THE COMMUNITY.

In *Word v. Colley*⁶ the generalization was made that "A community debt may be said to be any debt or liability made by the husband during the marriage." The husband is in all the states the statutory manager of the community property. He makes the contracts for the most part and occasionally he commits torts in the course of his profession or business. His personal earnings being community property, there could of course be no justification in

¹ It is not thought that this is an exhaustive classification, as it does not necessarily take account of certain obligations that may not arise from contract or tort. Quasi-contracts, however, are included.

² E. g., where he borrows money to build a house to be used for a family residence, and where while operating a community automobile as a common carrier he injures a passenger.

³ As where a suretyship obligation is assumed gratuitously, and where the husband comes under an obligation to pay damages for the alienation of the affections of another man's wife.

⁴ This is illustrated by the borrowing of money by the wife of which the community gets the benefit, and by cases where she by false representations sells community property standing in her name from which the community profits.

⁵ E. g., the purchase of a piano without the knowledge of the husband and not used by the community; and where she becomes liable for slander, or an assault.

⁶ (1912) 143 S. W. 257 (Tex. Civ. App.); *Hinzie v. Robinson* (1899) 21 Tex. Civ. App. 9, 50 S. W. 635; *Dever v. Selz* (1905) 39 Tex. Civ. App. 558, 87 S. W. 891.

exempting the community income from such evident community obligations arising from either source. The courts and legislatures agree substantially on this matter, the only serious difficulty being to determine just what contracts and torts are separate and what are community. A serious difficulty has arisen in Washington, the earlier cases⁷ holding that certain torts were separate whereas in other cases substantially similar torts were treated as community torts.⁸ During the continuance of the marital relation it may often be of no great importance to distinguish between obligations and to determine which are separate and which are community, except of course in Washington. After the dissolution of the community the differentiation should be important, for when that happens the one-half interest of each should be liable for the separate debts of the owner.⁹

(a) *Contracts*—Suretyship contracts from which the community derives a profit, as where the husband is paid for incurring the obligation, or where he becomes a surety for a corporation in which the community holds stock;¹⁰ where a father promises to help his son start in life and, in pursuance of such promise, signs notes for the son for the purchase price of land, the son having worked at home several years after attaining his majority;¹¹ the debts of a partnership;¹² the debt of a contractor for materials;¹³

⁷ *Brotton v. Langert* (1890) 1 Wash. 73, 23 Pac. 688 (tort committed by the husband, in the exercise of his office as constable, converting plaintiff's property); *Day v. Henry* (1914) 81 Wash. 61, 142 Pac. 439 (same); *Bice v. Brown* (1917) 98 Wash. 416, 167 Pac. 1097 (tort committed by husband in piling logs on the right of way while acting as a member of a drainage board).

⁸ *McGregor v. Johnson* (1910) 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022 (fraudulent representations made in exercise of business as broker); *Geissler v. Geissler* (1917) 164 Pac. 746 (Wash.) (husband used undue force, amounting to an assault, in removing a community automobile); *Milne v. Kane* (1911) 64 Wash. 258, 116 Pac. 659, 36 L. R. A. (N. S.) 88, Ann. Cas. 1913D 318 (injury to passenger while husband was acting as a common carrier for hire); *Woste v. Rugge* (1912) 68 Wash. 90, 122 Pac. 988 (injury to customer through negligence of merchant in leaving trap-door open).

⁹ *Columbia Nat. Bank v. Embree* (1891) 2 Wash. 331, 26 Pac. 257.

¹⁰ *Floding v. Denholm* (1905) 40 Wash. 463, 82 Pac. 738; *National Surety Co. v. Blumauer* (C. C. A. Wash. 1918) 247 Fed. 937; *Williams v. Hitchcock* (1915) 86 Wash. 536, 150 Pac. 1143; *Way v. Lyric Theater Co.* (1914) 79 Wash. 275, 140 Pac. 320; *Barnett v. O'Laughlin* (1896) 44 Pac. 267 (Wash.) (husband gave an attachment bond in the prosecution of a cause of action belonging to the community).

¹¹ *Reed v. Loney* (1900) 22 Wash. 433, 61 Pac. 41.

¹² *Tacoma Assn. of Credit Men v. Lyons* (1918) 172 Pac. 823 (Wash.); *Ruuth v. Morse Hdw. Co.* (1913) 74 Wash. 361, 133 Pac. 587; *Diamond v. Turner* (1895) 11 Wash. 189, 39 Pac. 379.

¹³ *Oregon Impr. Co. v. Sagmeister* (1892) 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233.

the statutory liability imposed upon holders of bank-stock, the community being the owner;¹⁴ money borrowed for the purchase of a lot and construction of a house to be used as a family dwelling;¹⁵ expenses incurred during the last illness of members of the family;¹⁶ a note given by the husband, pending divorce proceedings, to protect the community's interest in a mine;¹⁷ the sale by a father of his child's property and the execution of an instrument by him acknowledging an obligation therefor,¹⁸ are illustrations of community obligations.

(b) *Torts*—In a general way it may be said that all torts are community¹⁹ which are committed during the marriage by the husband in the course of his business or professional operations, just as all contracts made under like circumstances are community contracts, the earnings or income from such business or calling being the chief source of community property. Under the entity theory the community, one may say, is liable under the doctrine of *respondeat superior*.

II. SEPARATE CONTRACTS AND TORTS OF THE HUSBAND.

It was early decided in Texas,²⁰ California²¹ and Louisiana that the community property may be taken for the postnuptial and also for the antenuptial debts of the husband. The Texas statute in force in 1840 seems to make the community property liable for

¹⁴ *Shuey v. Adair* (1901) 24 Wash. 378, 64 Pac. 536.

¹⁵ *Clark v. Eltinge* (1902) 29 Wash. 215, 69 Pac. 736; In *Northern Bank & Trust Co. v. Coffin* (1920) 194 Pac. 385 (Wash.) the husband had loaned a sum of money to one C., the president of the bank, as an accommodation, borrowing the sum from the bank and giving his note therefor; C. gave his note to the husband at the same time for the sum borrowed. It was held that this transaction was a straight borrowing from the bank and lending to C. and not a suretyship transaction and that the money so borrowed by the husband gave rise to a community obligation.

¹⁶ *Succession of Casey* (1912) 130 La. 743, 58 So. 556; *Hollie v. Taylor* (1916) 189 S. W. 1091 (Tex. Civ. App.).

¹⁷ *Johnson v. Garner* (D. C. Nev. 1916) 233 Fed. 756.

¹⁸ *Word v. Colley* (1912) 143 S. W. 257 (Tex. Civ. App.).

¹⁹ The word "community" is used in two senses throughout, and this double use seems unavoidable. It is used first to denote the status of the marital union, an ideal entity whether or not recognized by the court as a legal entity. Secondly, it is used as an adjective or as a substantive in the sense of property owned by this entity. It is believed that the context will indicate the nature of the use in each case.

²⁰ *Portis v. Parker* (1859) 22 Tex. 699.

²¹ *Schuyler v. Broughton* (1886) 70 Cal. 282, 11 Pac. 719; *Vlautin v. Bumpus* (1868) 35 Cal. 214; *Van Maren v. Johnson* (1860) 15 Cal. 308; *Farmers Bank v. Drew* (1920) 32 Cal. App. Dec. 776, 192 Pac. 105; *Davis v. Compton* (1858) 13 La. Ann. 396; *Hawley v. Crescent City Bank* (1874) 26 La. Ann. 230. For the rule in Washington, see *Snyder v. Stringer* (1921) 198 Pac. 733.

separate postnuptial debts of the husband and the statute of 1848 made no substantial change. These are the only states where the antenuptial debts of the husband were so chargeable. There is a tendency, however, in all the states save Washington, where the entity theory prevails, to hold that the community property may be taken in execution for the separate postnuptial debts of the husband, although the problem has not arisen in all the states with reference to both contracts and torts. There is no logical reason for distinguishing between them.

(a) *Contracts*—The authority for the doctrine that community property is liable for the husband's separate debts is not so strong as seems to be supposed. It is the inevitable result in California²² where the husband owns the community property and the wife has an expectancy only.²³ As good an illustration as can be found is the recent Idaho case, *Holt v. Empey*.²⁴ There certain community property was attached for the separate contractual debt of the husband for the purpose of obtaining *in rem* jurisdiction, he being served with summons by publication in Idaho. The wife intervening, alleged the community character of the property and asserted that it was not liable for his separate debts, relying on the Washington decisions. The court refused to take this view and held that the settled rule in Idaho makes the community property liable for such debt. No cases were cited to show how or when the rule was established. There is no statute in Idaho affecting the matter.

The Arizona court in passing on this problem²⁵ said that the general rule was that community property was liable for community debts in all the states, and observed: "The other general rule, viz., 'The community property is, in general also liable for the husband's debts,' is nearly as universal. . . . In the absence of some particular statute to the contrary, the general rule seems to have the support of reason, and to accord with the spirit of the community property system as adopted by the statutes of Arizona." In showing the so-called general rule to be established, the court cites "Cyc.," one case from the Federal courts and two cases from

²² *Farmers Bank v. Drew*, supra, n. 21.

²³ See discussion of this topic in an article by the author entitled "The Ownership of Community Property" in 35 *Harvard Law Review*, 47 (November, 1921).

²⁴ (1919) 32 Idaho 106, 178 Pac. 703.

²⁵ *Villescas v. Arizona Copper Co.* (1919) 179 Pac. 963 (Ariz.).

Texas.²⁶ The Federal court case holds that a note given during marriage to protect a community interest in a mine is a community obligation after divorce where there was no division of property, and so is clearly not in point. As observed above, the Texas cases rest upon a statutory provision. The cases cited in "Cyc." to show that the "community property is in general also liable for the husband's separate debts" are from California, Louisiana, and Texas.²⁷ At one time Louisiana²⁸ followed the California theory that the husband is the owner of community property, but changed to the Texas theory about the year 1907. Thus in Texas the rule is statutory and in California (and formerly in Louisiana) the husband owns the property and there is nothing illogical in holding it liable for his debts.

A suretyship contract from which no advantage accrues or is expected to accrue to the community, as for example where the liability is assumed gratuitously, is separate;²⁹ likewise the expenditure of funds by a father after divorce on the education of his child;³⁰ a contract to pay a commission to an agent for selling community land where the husband had no authority to make such contract,³¹ create separate obligations. The same was held in Louisiana with reference to funeral expenses of the husband because incurred after the dissolution of the community.³²

²⁶ 21 "Cyc" 1676; *Johnson v. Garner* (D. C. Nev. 1916) 233 Fed. 756; *Seabrook v. Bank* (1914) 171 S. W. 247 (Tex. Civ. App.); *Ochoa v. Edwards* (1916) 189 S. W. 1022 (Tex. Civ. App.). In none of these cases does it appear that the debt was separate, and in the first one it clearly appears to be a community debt.

²⁷ *Schuyler v. Broughton* (1886) 70 Cal. 282, 11 Pac. 719; *Davis v. Comp-ton* (1858) 13 La. Ann. 396; *Lee v. Henderson* (1889) 75 Tex. 190, 12 S. W. 981; *Cleveland v. Cole* (1885) 65 Tex. 402; *Cowan v. N. O. Nelson Mfg. Co.* (1896) 34 S. W. 1045 (Tex. Civ. App.).

²⁸ *Guice v. Lawrence* (1847) 2 La. Ann. 226; *Succession of Bover* (1884) 36 La. Ann. 506, *Luria v. Cote Blanche Co.* (1905) 38 So. 279 (La.). For the change in view, see *Succession of Marsal* (1907) 118 La. 212, 42 So. 778.

²⁹ *Case Threshing Machine Co. v. Wiley* (1916) 89 Wash. 597, 154 Pac. 437; *American Surety Co. v. Sandberg* (C. C. A. 1917) 244 Fed. 701; see also (D. C. Wash. 1915) 225 Fed. 150; *Kanters v. Kotick* (1918) 173 Pac. 329 (Wash.); *Gund v. Parke* (1896) 15 Wash. 393, 46 Pac. 408; *Shuey v. Holmes* (1898) 20 Wash. 13, 54 Pac. 540; *Spinning v. Allen* (1895) 10 Wash. 570, 39 Pac. 151; *Hinz v. Robinson* (1899) 21 Tex. Civ. App. 9, 50 S. W. 635.

³⁰ *Moor v. Moor* (1903) 71 S. W. 794 (Tex. Civ. App.).

³¹ *Nishimoto v. Carlton* (1919) 182 Pac. 617 (Wash.) "The complaints were upon contracts, and judgments were sought that in no way affected Mrs. Vernon in her own right and property." It is doubtful what this means. The opinion seems elsewhere to approve a judgment which affects community property. But cf. *Philips & Co. v. Langlow* (1909) 55 Wash. 385, 104 Pac. 610.

³² *Succession of Pizati* (1917) 75 So. 498 (La.).

The only pertinent statute in Arizona reads:³³

"The community property of the husband and wife shall be liable for the community debts contracted by the husband during the marriage, except in such cases as are specifically excepted by law."

If we may apply the principle *expressio unius exclusio alterius*, it seems clear that community liability for separate debts is denied.

In Washington, from which most of the illustrations of "community debts" are taken, there has been a rather careful consideration of this matter. In *Peacock v. Ratliff*³⁴ the husband entered into a contract with certain attorneys for legal services and an instruction that prima facie such contract was for the benefit of the community was held correct. So where the husband executed a note, the presumption is that it was executed for a community debt.³⁵ The debt must be a community debt in order to be chargeable to the community. If the obligation is separate in the state where it arose, it is separate in Washington, although such debt if arising in Washington would have been community.³⁶ Thus the Washington rule follows the conflict of laws rule that the nature of the debt is determined by the place of creation rather than by the character of the property out of which it might be considered that satisfaction should come. In *Clark v. Eltinge*³⁷ the law of Montana was presumed to be the same as that of Washington, no proof with reference thereto being offered (though it is well known that Montana is not a community property state); consequently a note given by the husband was presumed to be a community obligation. Formerly in Washington the community personalty but not the community realty could be taken in execution for the husband's separate debts, apparently because the husband had the absolute power of alienation over it as of his own separate property.³⁸ Subsequently these cases were overruled, the court reaching the logical

³³ Par. 3854, Rev. Stats. Ariz. 1913.

³⁴ (1911) 62 Wash. 653, 114 Pac. 507.

³⁵ *Reed v. Loney* (1900) 22 Wash. 433, 61 Pac. 41.

³⁶ *La Selle v. Woolery* (1896) 11 Wash. 337, 39 Pac. 663, 32 L. R. A. 73, 14 Wash. 70, 44 Pac. 115, 53 Am. St. Rep. 855, 32 L. R. A. 75; *Huyvaerts v. Roedtz* (1919) 178 Pac. 801 (Wash.); *Deering v. Holcomb* (1901) 26 Wash. 588, 67 Pac. 240; *Clark v. Eltinge* (1902) 29 Wash. 215, 69 Pac. 736.

³⁷ *Supra*, n. 36.

³⁸ *Andrews v. Andrews* (1887) 3 Wash. Terr. 286, 14 Pac. 68; dictum in *Powell v. Pugh* (1896) 13 Wash. 577, 43 Pac. 879; *Gund v. Parke* (1896) 19 Wash. 92, 52 Pac. 531, 67 Am. St. Rep. 723; *Snyder v. Stringer* (1921) 198 Pac. 733 (Wash.).

conclusion of its own theory that the agential power of the husband to alienate was not identical with ownership.³⁹

(b) *Torts*—A like rule applies to torts of the husband. An extreme case, *Villescas v. The Arizona Copper Company*,⁴⁰ arose recently in Arizona. The husband had committed a crime not in connection with the community and a levy was made upon community land to collect a fine imposed as a punishment therefor. An action of ejectment was brought by husband and wife, former owners of the land, against defendant, who asserted a title acquired through a levy, sale, and conveyance by the United States marshal. It was held that the community property was liable for such an obligation and that the rule was settled, the court of course making no distinction between obligations arising from contract and from tort. Under such a holding the expression "community debts" would signify little during the continuance of the marriage. Thus the wife's property is taken to pay the penalty for the husband's crime as effectually as if the crime had been directly charged to her, for in Arizona the wife owns a one-half undivided legal interest in the community property.

In Washington, obligations arising from torts of the husband may not be satisfied out of the community property unless the torts were committed in the course of the business of the husband acting for the community. Just what the connection is, is not always easily distinguishable. In *Brotton v. Langert*,⁴¹ the defendant was a constable and as such sold certain property in which the plaintiff had a special interest, in execution of a judgment against a third person. A judgment was secured against defendant for this tort and his wife thereafter brought an action to prevent the extension of the judgment lien over the community realty. It was held that this judgment being for a tort, the obligation was not incurred for the benefit of the community, and that as the husband did not have the direct power of voluntary alienation, neither could the community property be taken indirectly. "The husband cannot do by indirection and fraud what he cannot do directly." In his dissenting opinion, Stiles, J., expressed what seems to be really the present view of the court:⁴² "A community debt . . . ought to be

³⁹ *Schramm v. Steele* (1917) 166 Pac. 634 (Wash.); *Huyvaerts v. Roedtz* (1919) 178 Pac. 801 (Wash.).

⁴⁰ (1919) 179 Pac. 963 (Ariz.).

⁴¹ (1890) 1 Wash. 73, 23 Pac. 688.

⁴² *Brotton v. Langert*, *supra*, n. 41, has never been overruled and seems to be expressly approved in a labored distinction which the court tries to

any liability incurred by either husband *or wife* during the marriage, which is not a separate debt by express terms or by reason of its being patently for the exclusive benefit of the separate property of the party contracting it. This has been substantially the construction put upon the term ever since the community property laws have existed here, by the business men of the state as well as by the legal fraternity."

Day v. Henry⁴³ was almost exactly parallel with the Brotton case on its facts and the holding the same, the court reaffirming its former position. There is no indication as to the nature of the tort in Wilson v. Stone.⁴⁴ In Schramm v. Steele⁴⁵ it was sought to hold the community personalty for a judgment obtained against the husband for alienating the affections of another man's wife. This was held rightly, of course, to be a separate tort and the cases holding that community personalty could be taken for the separate tort or other separate obligation of the husband were definitely overruled.

On the other hand, where the husband, in the course of operating an automobile as common carrier for profit, injured a passenger by his negligence, a community obligation was held to have arisen;⁴⁶ and where the husband uses undue force in removing a community automobile from the garage where it is being repaired, thus injuring the wife of the repair-man who seeks to retain it, his act amounts to an assault for which the community is liable;⁴⁷ if a merchant negligently maintains a trap-door in his place of business whereby a customer is injured, a community tort arises;⁴⁸

draw in Day v. Henry (1914) 81 Wash. 61, 142 Pac. 439, between "cases where the wrongdoer was an individual belonging to the community, and where the community itself was the wrongdoer." It is submitted that this is purely a matter of agency and if the act is performed while the actor is occupied in such way that his earnings belong to the community, then the community should be liable. In Kies v. Wilkinson (1921) 194 Pac. 582 (Wash.) a county clerk withdrew public funds from an insolvent bank, so that the payment to him became a preference. This was an official act and the court, following the Brotton, Day, and Bice cases, held that a separate tort had been committed, that the community received no benefit therefrom and so no community liability arose. In Gomez v. Scanlan (1909) 2 Cal. App. 579, 102 Pac. 12, a constable was held liable for false imprisonment but there was no reference to the question whether the tort was community or separate, but in California the nature of the tort makes no difference.

⁴³ Supra, n. 42.

⁴⁴ (1916) 90 Wash. 365, 156 Pac. 12.

⁴⁵ (1917) 166 Pac. 634 (Wash.).

⁴⁶ Milne v. Kane (1911) 64 Wash. 258, 116 Pac. 659, 36 L. R. A. (N. S.) 88, Ann. Cas. 1913D 318.

⁴⁷ Geissler v. Geissler (1917) 164 Pac 746 (Wash.).

⁴⁸ Woste v. Ruggie (1912) 68 Wash. 90, 122 Pac. 988.

and there is the same result where a real estate broker misrepresents the price of land to his principal and fraudulently profits thereby;⁴⁹ and where the husband as a notary makes a false certification.⁵⁰ It is particularly difficult to distinguish the latter from the Brotton case, *supra*.

It is generally thought that the statutory power of management of the husband enables him alone to prosecute and defend actions in his own name which have to do with the community estate, but in Washington, community property not being liable for these separate obligations, it follows that the wife is a proper or necessary party defendant in many cases where in other states she would be neither a necessary nor a proper party. Thus in Washington the wife is a proper party defendant in all actions where plaintiff seeks to establish the character of the obligation as community,⁵¹ the reason being that a finding that a given obligation is community, the husband alone being a party, would as to her be a *res inter alios acta*, and she could probably at any stage of the transaction come in as an intervener and enjoin the sale.⁵² She is not, however, a necessary party and under a judgment on a debt against the husband alone the community realty may be sold and the purchaser acquires a good title.⁵³ If a sale has been made and she seeks to set it aside she must affirmatively allege facts in her complaint which show that the obligation is not a community obligation.⁵⁴

In all actions where a mortgage or other lien is asserted against

⁴⁹ *McGregor v. Johnson* (1910) 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. In *Hendrickson v. Smith* (1920) 189 Pac. 550 (Wash.) 12 A. L. R. 833, the wife, having been injured by an automobile, employed defendant, an attorney, to prosecute an action for damages. The action was brought and compromised, the attorney receiving fourteen hundred dollars in settlement. He paid some bills for his client, gave her a small sum and kept the remainder. It was held that his tort created a community liability. It was committed in the course of ordinary business and so presumably in the interest of the community. One might inquire why a distinction is made between the ordinary business from which the matrimonial community derives its income, and occupation as an officer from which also the community derives its income.

⁵⁰ *Kangley v. Rogers* (1915) 85 Wash. 250, 147 Pac. 898.

⁵¹ *Clark v. Eltinge* (1902) 29 Wash. 215, 69 Pac. 736; *McDonough v. Craig* (1894) 10 Wash. 239, 38 Pac. 1034; overruling apparently *Bank v. Scott* (1893) 33 Pac. 829, 34 Pac. 434 (Wash.); *Allen v. Chambers* (1897) 51 Pac. 478 (Wash.); *Andrews v. Andrews* (1887) 3 Wash. Terr. 286, 14 Pac. 68.

⁵² *Gund v. Parke* (1896) 15 Wash. 393, 46 Pac. 408; *Woste v. Rugge* (1912) 68 Wash. 90, 122 Pac. 988.

⁵³ *Horton v. Donohoe-Kelly Banking Co.* (1896) 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *Woste v. Rugge*, *supra*, n. 52.

⁵⁴ *Bryant v. Stetson & Post Falls Mill Co.* (1896) 13 Wash. 692, 43 Pac. 931.

community land, or a foreclosure thereof is desired, such assertion or foreclosure is wholly void if the wife is not a party defendant.⁵⁵ The husband may, however, alone enter into contracts wherefrom the right to a lien against the community land may arise.⁵⁶ In filing a lien the wife should be named as one of the owners, under the lien law.⁵⁷ She is therefore a proper party defendant in all personal actions where a community obligation is alleged and a necessary party where an interest is being enforced against community land.⁵⁸

The wife is held also to be a necessary party plaintiff wherever an action is brought to recover community land or for damages thereto,⁵⁹ or for the rents and profits thereof,⁶⁰ for the reason, as given, that otherwise the husband might be able to compromise community rights and thus do indirectly what he could not do directly. What would seem to be allowed under the management statute is thus held to be forbidden under the alienation statute.

In other states generally the wife is not a proper party defendant or plaintiff in contract or tort actions where she was not an actor,⁶¹ although in foreclosure of mortgages and other liens on

⁵⁵ *Peterson v. Dillon* (1901) 67 Pac. 397 (Wash.); *Powell v. Nolan* (1902) 27 Wash. 318, 67 Pac. 712; *City of Seattle v. Baxter* (1898) 20 Wash. 714, 55 Pac. 320; *Turner v. Mfg. Co.* (1894) 37 Pac. 674 (Wash.); *Dane v. Daniel* (1900) 63 Pac. 268 (Wash.); *French v. Taylor* (1909) 54 Wash. 624, 104 Pac. 125; *McNair v. Ingebristen* (1904) 36 Wash. 186, 78 Pac. 789; *Sloane v. Lucas* (1905) 37 Wash. 348, 79 Pac. 949. The decision in *Leggett v. Ross* (1896) 44 Pac. 111 (Wash.) seems scarcely to be in harmony with these views, where it is held that in a suit brought by the husband to establish a boundary line to community land, the judgment binds the wife though she was not a party, in the absence of a showing that it was brought without her knowledge or against her will.

⁵⁶ *Littell & Smythe Mfg. Co. v. Miller* (1892) 3 Wash. 480, 28 Pac. 1035.

⁵⁷ *Sagmeister v. Ross* (1892) 4 Wash. 320, 30 Pac. 80, 744; but compare *Douhitt v. MacCulsky* (1895) 40 Pac. 186 (Wash.).

⁵⁸ *Dane v. Daniel*, *supra*, n. 55. The husband cannot even release a contract he has entered into for the purchase of land, *Zeimantz v. Blake* (1905) 39 Wash. 6, 80 Pac. 822, but the wife can foreclose a mortgage alone, *Nance v. Woods* (1914) 79 Wash. 188, 140 Pac. 323; the husband can sue alone for breach of personal contract by which the community land incidentally would have been benefited, *Belt v. W. W. P. Co.* (1901) 24 Wash. 387, 64 Pac. 525. It is not necessary for the wife to join in a foreclosure suit in Nevada although the note and mortgage stand in her name, *Crow v. Van Sickle* (1870) 6 Nev. 146.

⁵⁹ *Parke v. City of Seattle* (1894) 8 Wash. 78, 35 Pac. 594.

⁶⁰ *Lowndsdale v. Boom Co.* (1899) 21 Wash. 542, 58 Pac. 663.

⁶¹ *Jackson v. Bradshaw* (1902) 28 Tex. Civ. App. 394, 67 S. W. 438; *Coal and Coke Co. v. Henry* (1898) 47 S. W. 281 (Tex. Civ. App.); *Barrett v. Tewksbury* (1861) 18 Cal. 334; *Mott v. Smith* (1860) 16 Cal. 533; *Swain v. Burnette* (1888) 76 Cal. 299, 18 Pac. 394; *Wilson v. Dickey* (1911) 133 S. W. 437 (Tex. Civ. App.); *Childress v. Robinson* (1913) 161 S. W. 78 (Tex. Civ. App.); *Campbell v. Kerns* (1907) 13 Idaho 287, 70 Pac. 108. Cf. *Collett v. Houston Co.* (1916) 186 S. W. 232 (Tex. Civ. App.).

land she should be a party defendant in states when there are statutes forbidding the alienation or incumbrance of community land unless the spouses join in the alienating or incumbering instrument.

III. WIFE'S COMMUNITY CONTRACTS AND TORTS

(a) *Contracts*—Naturally the first difficulty in connecting this topic with community obligations is the fact that the husband is the manager of the community property, and the right of management would seem to carry with it the sole right to create community obligations. There is a second difficulty in that there are statutes, as in California⁶² and Washington,⁶³ which provide that the community property shall not be liable for the wife's contracts unless the husband consent thereto in writing, and also that she alone shall be liable for her torts.⁶⁴ Each of these create serious obstacles in the way of finding a community obligation. It is not believed, however, that they are conclusive of the matter. The ordinary experience of every household indicates that it is frequently inconvenient and sometimes practically impossible that management shall be a "one-sided" matter. The question of necessities is not here referred to, inasmuch as the case of family necessities is for the most part provided for by statute.

The statutes in most community property states, save Louisiana and Texas, afford the wife substantially a free hand to contract for herself and bind her separate estate. But when is she contracting for herself? This problem is closely connected with another problem to be discussed at another time, namely, the character of money borrowed by the wife and her purchases on credit. The normal presumption in the case of money which she borrows or credit purchases which she makes, there being no express evidence to the contrary at the time, is that such money and such purchases become community property⁶⁵ and as such have in some states been held

⁶² Kerr's Cyclopedic Civil Code of California, § 167, which reads: "The property of the community is not liable for the contracts of the wife made after the marriage unless secured by a pledge or mortgage thereof signed by her husband". Cf. Vernon's Texas Civil and Crim. Stats. 1918 Supp. Art. 4621.

⁶³ Remington's 1915 Codes and Statutes of Washington, §§ 5927, 5930. For other states see Rev. Stats. New Mexico, 1915, §§ 2762, 2765; Arizona Rev. Statutes 1913, Pars. 3852, 3854, 3855; Vernon's Sayles Texas Civil Statutes 1914, Art. 4624.

⁶⁴ Remington's 1915 Codes and Statutes of Washington, § 5929; Kerr's Cyclopedic Civil Code of California, § 171a, enacted in 1913.

⁶⁵ Yesler v. Hochstettler (1892) 4 Wash. 349, 30 Pac. 398.

liable for the debts of the husband, whether they be separate or community. If, therefore, such property is community, and the community is benefited thereby, how can the community fail to be liable for the repayment of the money for the balance of the purchase price? When these contracts are entered into by the wife, does she not create by contract a community obligation? In *Chaney v. The Gauld Company*⁶⁶ the court observed that the only source that the lender had to recover his money was the community. It does not seem to have yet been discovered that there is an inconsistency in holding that money borrowed by the wife is *prima facie* the property of the community and at the same time holding that she cannot create a community obligation. An excellent illustration is afforded by the case of *Fielding v. Ketler*,⁶⁷ wherein the wife borrowed certain money of her mother and invested it in a hotel operated by and for the community. In a suit to recover the money thus loaned, the husband was joined with the wife as defendant and a recovery was allowed out of the community property. It seems to follow that where the wife contracts for property and obtains that for which she has contracted, which property becomes community, she is herself liable because she is a party, and the community is liable because it has profited thereby.⁶⁸

On what theory is the community liable? Two may be suggested, the first being that of quasi-contract and the other of agency. It is in many cases not easy to determine what is the correct theory because knowledge by the husband of the acquisition by the wife and a failure by him to repudiate the obligation may seem to ratify the wife's contract for the community and to create an implied agency. It is believed, however, that whether the husband becomes cognizant of the acquisition or not, the community should be and is liable where there is a distinct advantage to it. The husband's failure to act in such a case should not be construed as acting and seems not to amount to a ratification. *Fielding v. Ketler*⁶⁹ should properly rest on the ground of unjust enrichment or quasi-contract. Both the wife and the community, but not the husband, were held personally liable, but if it were a matter of agency then the community and the husband and not the wife should be liable, for an agent is not contractually liable for the contracts made by him

⁶⁶ (1915) 28 Idaho 76, 152 Pac. 468.

⁶⁷ (1915) 86 Wash. 194, 149 Pac. 667.

⁶⁸ *Booth Mercantile Co. v. Murphy* (1908) 14 Idaho 212, 93 Pac. 777.

⁶⁹ *Supra*, n. 67.

outside the scope of his authority but ratified by his principal.⁷⁰ In *Grote-Rankin v. Brownell*⁷¹ it was held that judgment should be entered against both husband and wife, because, the court said, the wife had full power of attorney to dispose of certain hotel fixtures and certain furniture held by them on conditional sale. The community was made liable as well as the wife separately for the balance due, which the vendee was obliged to pay. No facts are recited in the opinion which indicate anything like a formal power of attorney, but the community profited by the transaction.

On quasi-contract theory the community should be charged only to the extent that it has profited by the transaction and not with the loss to the vendee. On the agency theory, however, the damages should be the value to the vendee of what he has parted with, but the wife as agent should not be personally liable. In the *Fielding* case, the loss to the lender and the gain to the community would probably be equal, because that was a case involving a definite sum of money, but not so necessarily in the *Grote-Rankin* case, and either theory might fit.

In *Williams v. Beebe*⁷² the court said that where a wife makes a lease and procures property thereunder, the contract is a property right and is community property, and that an action on such lease can be maintained against both husband and wife, and cited other cases. In *Booth Mercantile Company v. Murphy*⁷³ the wife pledged her separate property for funds to be used in the purchase of hotel fixtures, the hotel to be operated for the benefit of the community. If the fixtures became community property, and presumptively they did because they were used for the benefit of the community, the community ought to be liable therefor to the extent that it profited by the transaction, but no effort was made to hold the community. The defense of the wife was that she could not be held liable for a community debt and on the theory of agency that defense seems sound. In *Mertz v. Conrad*⁷⁴ goods were sold to the spouses but billed to the wife at the husband's request and the mercantile business in which they were engaged was conducted for the benefit of the community. On suit against both for the price of the goods, the wife objected that a personal judgment could not be entered against her because a wife is not personally

⁷⁰ Mechem on Agency, §§ 1402, 1406.

⁷¹ (1913) 40 Wash. 335, 136 Pac. 145.

⁷² (1914) 79 Wash. 133, 139 Pac. 867.

⁷³ (1908) 14 Idaho 212, 93 Pac. 777.

⁷⁴ (1906) 45 Wash. 119, 87 Pac. 1118, 122 Am. St. Rep. 889.

liable for community obligations. A judgment against both spouses individually and against the community was held not erroneous. *Balkema v. Grolimund*⁷⁵ is another interesting Washington case. The wife had given her note to one Seeds, the consideration therefor being that he procure for her an acceptance by the Federal Land Office of her application for entry of certain desert land. Seeds indorsed the note to the plaintiff who brought an action thereon against both husband and wife. It was held that the wife could not thus create a community obligation; that in order to charge the community there must be an authorization by the husband shown, or a ratification, or else that the community got the proceeds. The court further observed that "property quickly becomes community if the husband acquiesces but it cannot be thrust upon him and he has a right to refuse it." Thus the court recognizes the possibility of either agency or unjust enrichment as a ground for holding the community liable⁷⁶ but the cases do not, as pointed out, follow either theory logically but sometimes treat the wife as having direct power to charge the community. If property were acquired under the contract just discussed, it is, as least presumptively, community property.

It seems probable that Idaho would follow the view set out in the *Fielding* case, though there has been no express decision on the point. In one case⁷⁷ where the wife had borrowed money from her father and land was bought with it, the question arose whether the land could be made liable for the husband's debts. The court observed that the lender would have to look for repayment to the community, hence the land must be community land and so liable. Save for the general provision that the husband is the manager of the community estate, Idaho has no statute with reference to the wife's power to bind the community. The court has repeatedly held⁷⁸ that if a married woman is to be bound by her contract for

⁷⁵ (1916) 92 Wash. 326, 159 Pac. 127.

⁷⁶ The court further says: "Of course we do not say that the holders of the wife's note may never hold the husband personally too, since there may be instances where it is so clearly essential to the common estate, where it is so plainly ratified by the husband, or where the purchased property is knowingly shared in or enjoyed by the husband, that he also should respond. *Fielding v. Ketler* (1915) 86 Wash. 194, 149 Pac. 667. But this is not a matter of presumption. It must be shown by the facts, none of which are offered here. The law is not unwilling but ready to fasten acquiescence on the husband, yet until the contrary is shown, a wife's note is presumed to be hers alone. If any encouragement was given to another doctrine in *Williams v. Beebe*, it was promptly corrected in *Hammond v. Jackson*."

⁷⁷ *Chaney v. The Gauld Co.* (1915) 28 Idaho 76, 152 Pac. 468.

⁷⁸ *Bank of Commerce v. Baldwin* (1906) 12 Idaho 202, 85 Pac. 497.

a debt, "it is necessary to allege and prove that it was contracted for her own use and benefit of her separate estate or in connection with the control and management thereof, or in conducting a business connected therewith." It was subsequently held⁷⁹ that "a contract made by a married woman by which she secures the property for which the contract was executed is for her own use and benefit and that such use and benefit is a fact resulting from the contract itself."

The Texas cases, where the wife made contracts from which a community obligation was held to have arisen⁸⁰ seem to rest on the ground of agency and not quasi-contract. In *Neighbors v. Anderson*⁸¹ the wife bought certain land and gave her obligation therefor. It was held that this contract was made presumably with the husband's consent since the spouses were cohabiting, and so the obligation was binding on the community. In *Walling v. Hanig*⁸² the wife bought various articles which were in use about the dwelling for more than a year. She had made some payments on them and the husband had been advised that they were purchased on credit. The court held that a community debt was created. Likewise in *Richburg v. McIlwaine*,⁸³ where the wife was conducting a millinery business and as a consequence incurred an obligation for goods purchased by her on credit, it was held that the profits of the business were community profits and as the business was being conducted for the benefit of the community and with the husband's knowledge and consent, he became personally liable therefor. But whether he knew of the matter or not, these goods would become community property under the general legal presumptions and the community should be liable.

⁷⁹ *Booth Mercantile Co. v. Murphy* supra, n. 73. *Contra*: *Wright v. Couch*, infra, n. 82.

⁸⁰ There is a dictum in *Lane v. Moon* (1907) 46 Tex. App. 625, 103 S. W. 211, as follows: "While a judgment against a married woman may be collected out of her separate or the community estate . . . it must be a judgment in fact." It seems to be well established that the community property was liable for the wife's antenuptial debts, *Taylor v. Murphy* (1878) 50 Tex. 291. Compare *Lilly v. Yeary* (1913) 152 S. W. 823 (Tex. Civ. App.). In *Nash v. George* (1851) 6 Tex. 234, it was said that there was no reason why the wife's antenuptial debts should not be paid out of community property as well as those of the husband.

⁸¹ (1901) 62 S. W. 417 (Tex.).

⁸² (1889) 11 S. W. 547 (Tex.). *Semble* *Wright v. Couch* (1908) 113 S. W. 321 (Tex. Civ. App.).

⁸³ (1910) 131 S. W. 1166 (Tex. Civ. App.). *Accord*: *Epperson v. Jones* (1886) 65 Tex. 425. In 1917 Art. 4621 was amended to the effect that the community property should not be liable for debts or damages arising from the contracts of the wife.

In another and similar case decided the same year,⁸⁴ it was held that the husband was not liable because the business was being conducted without his consent. One is tempted, however, to believe that the real reason for a holding in this case different from that in the Richburg case was that there were no profits.

It is difficult to see how the court reached the result that is found in *Sweeney v. Taylor*.⁸⁵ The wife had purchased a ring paying therefor in cash sixty dollars and gave a chattel mortgage for the balance of the purchase money. The mortgage was recorded. She then pledged the ring and the pledgee repledged it for more than the amount of the original pledge price, paying to the wife the amount of the excess. The wife later became insane. An action was subsequently brought against the husband, the wife, and the second pledgee for the recovery of the ring, or in the alternative to recover from the husband the unpaid balance. It was held that a judgment in favor of the husband would not be disturbed but that as he participated in the pledging of the ring he thereby made a valid contract with the pledgee and that such contract and lien arising therefrom were superior to the chattel mortgage made by the wife, the mortgage being invalid because made by a married woman without power to make such a contract. It seems strange that the court should hold that the ring became community property in the absence of proof that it was purchased with the wife's separate funds and that the husband accordingly had the power to sell or pledge it but that the community was not liable therefor. This is a clear case of unjust enrichment.

In another case⁸⁶ it became necessary for the wife to contract for necessities, not for herself or children but for her husband. She employed a nurse for the husband in his last illness and was sued on the contract. After his death she orally promised to pay the claim from her own funds. It was held that she was not personally liable on the contract of employment because a married woman's unauthorized contract is void and she was not liable on the subsequent promise, it being a promise to pay the debt of

⁸⁴ *Jones v. Millinery Co.* (1910) 63 Tex. Civ. App. 197, 132 S. W. 864.

⁸⁵ (1906) 92 S. W. 442 (Tex. Civ. App.).

⁸⁶ *Flannery v. Chidzey* (1903) 33 Tex. Civ. App. 638, 77 S. W. 1034. In *Castor v. Peterson* (1891) 2 Wash. 204, 26 Pac. 223, 26 Am. St. Rep. 854, a note was made payable to the wife which she transferred to the plaintiff by indorsement. It was held that while the note belonged to the community it must be treated as separate in the hands of a bona fide purchaser and the husband could not intervene and claim it, and that the wife's transfer was valid. See *contra*, *Hemmingway v. Mathews* (1853) 10 Tex. 207.

another and so within the Statute of Frauds. The husband's estate was held liable on the theory of implied contract [quasi-contract?].

Before the enactment of the amendment to the California Civil Code, referred to above,⁸⁷ the case of *Althof v. Conheim*⁸⁸ arose. The wife had purchased a lot with borrowed money and had taken title in her own name, but the lot was used by the community and a portion of it sold. On suit by the lender it was held that the debt was a community obligation and that, as no personal judgment could be obtained against the wife, she was not a proper party defendant and the husband alone was liable. This situation looks like quasi-contract and seems not to be covered by the above quoted provision of the statute. Since that enactment another case⁸⁹ arose where the wife had purchased certain books and signed orders for the same. The vendor in his complaint did not allege that the books became the separate property of the wife and he joined both husband and wife as defendants. It was held that she was not liable unless there was a distinct averment that the contract was made by her individually and inured to her separate benefit, and further that: "If it is intended to hold the community property liable the wife should not be joined with the husband." Thus the court seems to recognize the possibility of the wife charging the community quasi-contractually.

In New Mexico a piano purchased by the wife partly on credit belongs to the community,⁹⁰ and so the debt would seem to be chargeable to the community. In Nevada it is declared that the wife has no power to bind her husband or the community property.⁹¹

In Louisiana, "property purchased by the wife is presumed to be community and to be liable for its debts unless the contrary is shown. Debts contracted during the marriage are presumed to be community, and the wife will not be bound unless it be shown that the consideration inured to her separate benefit."⁹²

(b) *Torts*—The illustrations of torts committed by the wife in

⁸⁷ *Supra*, n. 62.

⁸⁸ (1869) 38 Cal. 230, 99 Am. Dec. 363. Cf. *Bashore v. Parker* (1905) 146 Cal. 525, 80 Pac. 707, where it was held that "where a married woman engages in trade, it is presumed to be with funds of the community.

⁸⁹ *Barrie v. Carolan* (C. C. Cal. 1901) 111 Fed. 134. Cf. *Remington v. Higgins* (1880) 54 Cal. 620. See *Jacobs v. Scott* (1878) 53 Cal. 74.

⁹⁰ *Gillett v. Warren* (1900) 10 N. M. 523, 62 Pac. 975; but compare *Morris v. Waring* (1916) 22 N. M. 175, 159 Pac. 1002.

⁹¹ *Travers v. Barrett* (1900) 30 Nev. 402, 97 Pac. 126.

⁹² *Graham v. Thayer* (1877) 29 La. Ann. 75; *Millaudon v. Carson* (1873) 26 La. Ann. 380; *Benedict v. Holmes* (1900) 104 La. 528, 29 So. 256. In the last two cases the wife created a community obligation for attorney's fees in suits against her husband.

the interest of the community are not many.⁹³ In *Oudin v. Crossman*⁹⁴ a certain community mine, having really no existence, stood in the name of the wife and was sold to a purchaser through the false representations of both wife and husband and a large profit came to the community. The damages for this injury were held to be a community liability but the wife was also personally liable. It seems that the community would have been liable if the husband had not been a joint tort-feasor. To hold the community liable quasi-contractually is not a violation of the statute. In *Magerstadt v. Lambert*⁹⁵ the spouses entered upon certain land dispossessing the owner and so committed a joint tort in the interest of the community. In *Waters v. Dumas*⁹⁶ the husband and wife were sued as joint trespassers without an allegation in the complaint that they were husband and wife. It was held that a demurrer thereto because they were husband and wife was not sustainable, as they were joint tort-feasors. In *Howard v. North*⁹⁷ the husband and wife were sued for fraudulent representations made by them in selling a certain tract of land, the separate property of the wife. It was held that where judgment is so obtained against both without specific directions in the decree as to the estate from which satisfaction is to come, it may as a general rule be satisfied out of the separate property of either or the community property, and as the wife was the beneficiary of the transaction her land could certainly be taken for the obligation. There is an implication that the husband would not have been separately liable if the decree had been differently entered.

IV. SEPARATE CONTRACTS AND TORTS OF THE WIFE.

(a) *Contracts*—The problem of borrowed money and purchases on credit so far as concerns the wife has already been alluded to. The presumption being that such acquisitions are community, it would seem to follow that obligations so created would prima facie likewise become community. The courts do not quite take that step and there is no clear distinction and no sure way of determining just what of her obligations are separate and what are community. In *Hall v. Johns*⁹⁸ the wife had borrowed money which she seems to have used for her separate benefit. "He only

⁹³ See note in Ann. Cas. 1913A 319.

⁹⁴ (1896) 15 Wash. 519, 46 Pac. 1047.

⁹⁵ (1905) 39 Tex. Civ. App. 472, 87 S. W. 1068.

⁹⁶ (1888) 75 Cal. 563, 17 Pac. 685.

⁹⁷ (1849) 5 Tex. 290, 51 Am. Dec. 769.

⁹⁸ (1909) 17 Idaho 224, 105 Pac. 71.

can create binding obligations against the community and he must settle and liquidate the debts out of the community property." Where a merchant supplies necessities to the wife⁹⁹ on her own contract, a community obligation arises but a separate obligation of the wife is created also. In *Jone-Rosquist-Killen Company v. Nelson*,¹⁰⁰ the community was not liable for a piano contracted for by the wife which was not used by the community but was left standing on the porch of the family dwelling until the action was brought. A contract executed by the wife with attorneys for their services, for the purpose of recovering damages for personal injuries to her, creates no community debt.¹⁰¹

In *Hall v. Decherd*¹⁰² a piano was purchased by the wife acting for her minor sons, who were to supply the funds and wished to make the piano a gift to their sister. It was held that neither the husband nor the community was liable since there was no benefit to the community contemplated. In *Bexar Building and Loan Association v. Heady*¹⁰³ the wife, being obliged to live in a different place from where her husband was employed, conceived the idea that it would be more economical to purchase a lot and construct a house on it for a dwelling than to pay rent. She therefore procured the lot and attempted to create a lien on it in favor of the plaintiff, who erected a dwelling for her of the value of \$2,000. The signature to the instrument she executed was acknowledged by her before an interested notary and so the lien was invalid. It was held that the obligation for the expenditure in the construction of the house was not one enforceable against "the wife's share of the community property." No personal claim was made against the husband, and the house not being a necessity, no community debt arose. It may be here that the plaintiff misconceived his remedy by asking payment out of the wife's one-half share of the community property because, as before observed, such property is

⁹⁹ *Edminston v. Smith* (1907) 13 Idaho 645, 121 Am. St. Rep. 294, 14 L. R. A. (N. S.) 871.

¹⁰⁰ (1917) 98 Wash. 539, 167 Pac. 1130. The husband is not liable for clothing and other dry goods supplied to the wife and charged to her unless proof is offered that he has not otherwise adequately provided for her, *Coulter Dry Goods Co. v. Munford* (1918), 38 Cal. App. 231, 175 Pac. 900.

¹⁰¹ *Hammond v. Jackson* (1916) 89 Wash. 510, 154 Pac. 1106. No services were actually performed. Cf. *Humphries v. Cooper* (1909) 55 Wash. 376, 104 Pac. 606, 133 Am. St. Rep. 1036, where the wife employed attorneys to procure a divorce and later condoned the offences, she was held liable for fees. But a community debt was created in *Hicks v. Stewart* (1909) 53 Tex. Civ. App. 401, 118 S. W. 206, because such services are a necessity.

¹⁰² (1910) 62 Tex. Civ. App. 426, 131 S. W. 1133.

¹⁰³ (1899) 50 S. W. 1079 (Tex. Civ. App.).

inseverable save at the instance of the spouses themselves. Here is a clear case of unjust enrichment by the community but clearly also no case of agency. Of course the wife was liable separately. It is believed thus that where an unjust enrichment arises to the community through the wife's contract, the community should be liable for the benefit and she should be liable on her contract, but where there is an agency, only the community and the husband separately should be liable. In *Jones v. Millinery Company*¹⁰⁴ there was no unjust enrichment to the community.

In *Rhoades v. Lyons*¹⁰⁵ the wife purchased an automobile on a conditional sale and was making the payments from her separate funds. It was subsequently attached as community property for the husbands' debts but was held to be separate property. A purchase by the wife on her sole credit was held not to create a community obligation since the property thus acquired is separate property. In New Mexico¹⁰⁶ it has been suggested that where the wife, having no property and so no security to offer, purchases on credit the acquisition must necessarily be separate because her credit is not an asset of the community; that the credit of the wife belongs to her and is her separate property but that the credit of the husband belongs to the community. The trouble with this argument rests at least in part on the fact that it flies in the face of the statute which in all the states provides substantially that "all other property acquired during the marriage is community property" and does not answer the question who is benefited by the transaction.

(b) *Torts*—In Texas and California the common-law rule making the husband liable for the wife's separate torts was early applied. Thus the husband is liable for slander¹⁰⁷ by the wife and for assault and battery.¹⁰⁸ In California the court concludes that

¹⁰⁴ (1910) 63 Tex. Civ. App. 197, 132 S. W. 864.

¹⁰⁵ (1917) 34 Cal. App. 615, 168 Pac. 385. Cf. *Roullard v. Gray* (1916) 30 Cal. App. 757, 159 Pac. 457. The common-law doctrine of the husband's liability for the wife's antenuptial debts was adopted in Texas and California although what is usually assigned as the reason for it did not exist. See note in *Ann. Cas.* 1913A 319. Such liability is denied in Washington, *Anderson v. Hilder* (1905) 38 Wash. 632, 80 Pac. 848, and in Louisiana, *Flogny v. Hatch* (1822) 12 Martin 84, referring to Civil Code 336, Art. 65.

¹⁰⁶ *Morris v. Warring*, *supra*, n. 90. The subject, "Money Borrowed by the Wife and Her Purchases on Credit," will be discussed in a subsequent paper.

¹⁰⁷ *McQueen v. Fulgham* (1864) 27 Tex. 464; *Zeliff v. Jennings* (1884) 61 Tex. 458; *Patterson & Wallace v. Frazier* (1906) 100 Tex. 103, 94 S. W. 324; see note in 30 L. R. A. 526.

¹⁰⁸ *Henley v. Wilson* (1902) 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941. In *McWhirter v. Fuller* (1918) 35 Cal. App. 288, 170 Pac. 417, it was held that where the wife drives the husband's automobile with his consent she

a proper interpretation of the married women's acts prevents the husband from being liable for torts of the wife committed in the management of her separate property.¹⁰⁹ In Texas¹¹⁰ it was said:

"That the husband is liable for the wife's torts, as well as she, is too well settled to admit of discussion, or require citation of authorities. For slander she is liable for exemplary damages as well as actual damages; and the husband being liable to the same extent as if she alone were answerable, he is likewise liable for exemplary damages."

The court further added that presumably the assets out of which the judgment could have been satisfied were community property and as such would have been subject to a judgment founded on the wife's torts even though it carried exemplary damages.

In Louisiana¹¹¹ the husband is not liable for the wife's torts (slander) where he is not cognizant of them. In Arizona,¹¹² after an able review of the cases following the common-law rule, and an examination of the Arizona constitution and statutes, it was held that the community was not liable for the wife's tort (assault and battery). There was no express provision in the constitution or statutes on the matter. It was held that such an inference was to be drawn from the general purport of the married women's property acts. No judgment being possible against him, it is evident that the community property could not be used to satisfy a judgment against her. Thus a different conclusion was reached from that in California in substantially the same situation.

In Washington,¹¹³ as also now in California,¹¹⁴ there is a statutory provision to the effect that for all injuries committed by married women damages may be recovered from them alone and the husband shall not be responsible therefor except in cases where he would be jointly responsible with her if the marriage did not exist. It is conceived that there are three classes of torts: (a) those affecting community interests; (b) those affecting her separate interests, and (c) those having no connection with property interests such as slander and assault ordinarily are. It is not believed that these statutes necessarily deny a remedy against the com-

is presumed to be his agent and so he is liable for damages to one injured by her. See notes in Ann. Cas. 1917E 228, and 2 A. L. R. 888. Of course if she is his agent the obligation is his, but it is hers also.

¹⁰⁹ Henley v. Wilson, *supra*, n. 108.

¹¹⁰ Patterson & Wallace v. Frazier, *supra*, n. 107.

¹¹¹ McClure v. McMartin (1901) 104 La. 496, 29 So. 227.

¹¹² Hageman v. Vanderdoes (1914) 15 Ariz. 312, 138 Pac. 1053.

¹¹³ Remington's Washington Code of 1915, § 5929.

¹¹⁴ Kerr's Cyclopedic Civil Code, § 171a.

munity in the first class of cases, in quasi-contract. Thus, as in *Strom v. Toklas*,¹¹⁵ in the event that the wife through false and fraudulent representations should succeed in renting a house to be used and which subsequently was used for a family dwelling, the community would be chargeable for the reasonable rental value of it.

In the states where there is no express statute concerning liability for the wife's torts, the reasoning of the Arizona court should be followed and only the wife's separate estate should be liable for her separate torts.

V. CONCLUSION.

It remains to make certain observations more or less obvious and to sum up.

Husband and wife may, in general, freely contract and make gifts *inter sese*, so when property, either community or separate, has once been validly given to the wife it cannot thereafter be taken for the husband's or for community obligations.¹¹⁶ In Louisiana the community creditors have a preference over the separate creditors in securing the payment of their claims out of the community property,¹¹⁷ the community being thus treated as a partnership or entity. The creditors have no right to require a settlement of accounts between spouses in order to make assets of a spouse available for the payment of that spouse's debts. Thus if the husband uses community or his separate funds in improving the separate estate of his wife, whether or not such act imports a gift of such funds or any claim for reimbursement, that question cannot be raised by creditors,¹¹⁸ in the absence of fraud.

In general the wife is not personally liable for community obligations unless she is the actor, as in *Booth Mercantile Company v. Murphy*,¹¹⁹ and *Fielding v. Ketler*.¹²⁰ In such case if she is sued alone judgment cannot be satisfied out of the community prop-

¹¹⁵ (1914) 78 Wash. 223, 138 Pac. 880.

¹¹⁶ *Goodfellow v. Le May* (1896) 15 Wash. 684, 47 Pac. 25.

¹¹⁷ *Thompson v. Vance* (1903) 110 La. 26, 34 So. 112.

¹¹⁸ *Blum v. Rogers* (1888) 9 S. W. 595 (Tex. Civ. App.); *Daniel v. Daniel* (1919) 181 Pac. 215 (Wash.). In *Frankel v. Boyd* (1895) 106 Cal. 608, 39 Pac. 939, it is shown that the community property is what is left after the obligations against the community are satisfied. All the community property had been set over to the wife on divorce leaving nothing wherewith to pay sundry community obligations. A creditor's bill to subject such property in the hands of the wife to the payment of the debts was sustained.

¹¹⁹ *Supra*, n. 73.

¹²⁰ *Supra*, n. 67.

erty,¹²¹ but in Texas she does not even then incur a separate obligation.¹²²

The husband is personally liable for community obligations created by him,¹²³ first because he alone is the contracting obligor and the creditor ordinarily looks to him for satisfaction. Then there may be the lingering notion, derived from Spanish law or from California decisions, that he is the owner of the community, as of his own separate property, combined with the fact that he is the manager, and the further fact that this is a practicable way to make the system work. After divorce he continues liable, but a community judgment may be satisfied out of the community property already divided between the estranged spouses, the former wife being for that purpose in Washington a necessary party defendant.¹²⁴

There may be a situation in which all the acquisitions would be separate, arising from either an antenuptial or postnuptial agreement that the property acquired by each after marriage and the earnings of each should be separate.¹²⁵ There may then arise a community obligation but no community property, in which event presumably each spouse would be separately liable for the obligation which he or she created. In Washington a single woman became surety on a note for a man whom she afterwards married.¹²⁶ A new note was executed after the marriage and it was held that the wife was now liable separately as an accommodation maker and the separate property of each but not the community estate could be taken in satisfaction of it.

The courts have sometimes enlarged the powers of the wife beyond the words of the statutes, especially in Texas, in cases of abandonment of the wife, where it has been held that she may not only, when abandoned, convey a good title to the community property acquired after such abandonment but also to that acquired

¹²¹ Conley v. Greene (1916) 89 Wash. 39, 163 Pac. 1089.

¹²² Flannery v. Chidgley (1903) 33 Tex. Civ. App. 638, 77 S. W. 1034.

¹²³ Johns v. Clothier (1914) 78 Wash. 602, 139 Pac. 755.

¹²⁴ McLean v. Burginger (1918) 171 Pac. 518 (Wash.).

¹²⁵ Union. Securities Co. v. Smith (1916) 160 Pac. 304 (Wash.).

¹²⁶ Katz v. Judd (1919) 185 Pac. 613 (Wash.); Silva v. Holland (1888) 74 Cal. 530, 16 Pac. 385. Where plaintiff worked for both husband and wife in and about a business in which they were jointly engaged, but the property used belonged to the wife, it was held that in suing both there was no misjoinder. The debt was then presumably community, and the separate debt of each. Compare King v. Somerville (1904) 80 S. W. 1050 (Tex. Civ. App.).

before.¹²⁷ In Washington,¹²⁸ in one case the wife sold an automobile which the husband had given to his paramour with whom he had been openly consorting. The husband was absent from the state at the time and on his return he sought to recover it from the wife's vendee, but judgment was rendered in favor of the latter. The court expressed its indignation at the treatment of the wife and found that the article was of a perishable nature and that she was justified in disposing of it; that the gift to the paramour was in fraud to the wife and so one he could not make and she was entitled to recover possession of it from the paramour. These decisions make the wife the manager for the community in certain extraordinary cases where the husband has either abandoned his functions or has fraudulently refused to perform them, or acts beyond the scope of his authority.

In conclusion we may observe that no legislature and no court has attempted to define "community debts" in any satisfactory way, although Washington courts have made more attempts than any other courts. It seems desirable that the term should carry with it some specific connotation rather than that it should be defined simply as "any debt or liability made by the husband during marriage."¹²⁹ This is particularly true if the claim made above is sound, that there is no established rule that community property is liable for the separate obligations of the husband save where so made by statute as in Texas, and where as in California, and formerly in Louisiana, the husband owns the community property. That being true, the only rule established, apart from statute, is the Washington rule that there is no such liability, the decisions in Idaho and Arizona being based upon a misapprehension. Under the Washington rule, again, the community property must be probated on the death of either spouse¹³⁰ but that is not the practice in California nor in the other states.¹³¹ It would seem that such probate on prior death of wife would be necessary in order to determine conclusively whether property in her possession or standing

¹²⁷ *Cheek v. Bellows* (1856) 17 Tex. 613, 67 Am. Dec. 686; *Zimpelman v. Robb* (1880) 53 Tex. 274.

¹²⁸ *Marston v. Rue* (1916) 159 Pac. 111 (Wash.).

¹²⁹ *Supra*, n. 6.

¹³⁰ *Magee v. Big Bend Co.* (1909) 51 Wash. 406, 99 Pac. 16; *Ryan v. Ferguson* (1891) 3 Wash. 356, 28 Pac. 910; *In re Hill's Estate* (1893) 6 Wash. 285, 33 Pac. 585; *Wiley v. Verhaest* (1909) 52 Wash. 475, 100 Pac. 1008; *Bank v. Cunningham* (1913) 72 Wash. 532, 130 Pac. 1148. See note L. R. A. 1917C 502.

¹³¹ *In re Wilson's Estate* (1917) 168 Pac. 503 (Ariz.); *Glover v. Brown* (1919) 32 Idaho 426, 184 Pac. 649; *Packard v. Arellanes* (1861) 17 Cal. 525.

recorded in her name is community and to make her share liable for her separate debts, but it would not be necessary from the point of view of the community creditors; the remaining property, whether community or belonging to the husband, would still be liable for community debts.

In spite of the statutory agency of the husband it seems clear that the wife may and often needs to create community obligations. Whether these obligations bind the community quasi-contractually, or whether it be on some theory of implied agency, or whether there be some necessary reserve power in the wife to create them directly, is not clearly worked out.¹³² There is no sound reason at all for ingrafting into community property law a liability for the antenuptial debts of either spouse or for the separate torts of the wife. As to the separate postnuptial obligations of the husband, the writer believes the Washington view not only sound but practicable in all the states save California.

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¹³² See *Houston Oil Co. v. Choate* (1921) 232 S. W. 285 (Tex. Civ. App.).